Fordham Law Review

Volume 50 | Issue 6 Article 11

1982

# The Propriety of Hearing Railway Labor Grievances and Fair Representation Claims in Federal Court

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# THE PROPRIETY OF HEARING RAILWAY LABOR GRIEVANCES AND FAIR REPRESENTATION CLAIMS IN FEDERAL COURT

## INTRODUCTION

Recently, railroad employees with grievances against their carrier-employers and fair representation suits against their unions have attempted to bypass the adjudication of the National Railroad Adjustment Board (NRAB)[1] by bringing both claims in federal court.[2] The courts generally refuse to hear the grievances against carrier-employers[3] because of well-established precedent granting the NRAB exclusive jurisdiction over these claims.[4] The Supreme Court, however, to assure a plaintiff-employee a fair hearing, has created an exception to the NRAB's exclusive jurisdiction.[5] It is now recognized that an employee with a fair representation suit against a union and a grievance against an employer may pursue both claims in federal court if bringing the grievance to the Board would prove futile.[6]

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1. 45 U.S.C. § 153 (1976).

2. Glover v. St. Louis-San Francisco Ry., 393 U.S. 324, 325-26 (1969); Raus v. Brotherhood of Ry. Carmen, 663 F.2d 791, 796-97 (8th Cir. 1981); McKinney v. International Ass'n of Machinists, 624 F.2d 745, 747-48 (6th Cir. 1980); Richins v. Southern Pac. Co., 620 F.2d 761, 761-62 (10th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981); Franklin v. Southern Pac. Transp. Co., 593 F.2d 899, 901 (9th Cir. 1979) (per curiam); Price v. Southern Pac. Transp. Co., 586 F.2d 750, 751-52 (9th Cir. 1978); Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747, 754-56 (3d Cir. 1977); Harrison v. United Transp. Union, 530 F.2d 558, 559 (4th Cir. 1975) (per curiam), *cert. denied*, 425 U.S. 958 (1976); Schum v. South Buffalo Ry., 496 F.2d 328, 329 (2d Cir. 1974); O'Mara v. Erie Lackawanna R.R., 407 F.2d 674, 676-77 (2d Cir. 1969), *aff'd sub nom.* Czosek v. O'Mara, 397 U.S. 25 (1970); Connor v. Brotherhood of Ry., Airline & S.S. Clerks, 496 F. Supp. 154, 155 (M.D. Pa. 1980); James v. Union Pac. R.R., 93 L.R.R.M. (BNA) 2857, 2857 (D. Neb. 1976); Sisson v. Atchison T. & S.F. Ry., 92 L.R.R.M. (BNA) 3673, 3674 (D. Kan. 1976); Horton v. United Transp. Union, 92 L.R.R.M. (BNA) 3546, 3547 (S.D. Ga. 1976).

3. *E.g.*, Raus v. Brotherhood Ry. Carmen, 663 F.2d 791, 798-99 (8th Cir. 1981); McKinney v. International Ass'n of Machinists, 624 F.2d 745, 747-48 (6th Cir. 1980); Franklin v. Southern Pac. Transp. Co., 593 F.2d 899, 901-02 (9th Cir. 1979) (per curiam); Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747, 754-55 (3d Cir. 1978); James v. Union Pac. R.R., 93 L.R.R.M. (BNA) 2857, 2859 (D. Neb. 1976); Horton v. United Transp. Union, 92 L.R.R.M. (BNA) 3546, 3547 (S.D. Ga. 1976).

4. Raus v. Brotherhood Ry. Carmen, 663 F.2d 791, 794 (8th Cir. 1981); McKinney v. International Ass'n of Machinists, 624 F.2d 745, 748 (6th Cir. 1980); Franklin v. Southern Pac. Transp. Co., 593 F.2d 899, 902 (9th Cir. 1979) (per curiam); Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747, 755 (3d Cir. 1977); *see* James v. Union Pac. R.R., 93 L.R.R.M. (BNA) 2857, 2859 (D. Neb. 1976); Horton v. United Transp. Union, 92 L.R.R.M. (BNA) 3546, 3547 (S.D. Ga. 1976).

5. Glover v. St. Louis-San Francisco Ry., 393 U.S. 324, 328-29 (1969).

6. *Id.* at 330-31; Schum v. South Buffalo Ry., 496 F.2d 328, 330 (2d Cir. 1974); Smith v. B & O R.R., 473 F. Supp. 572, 578 (D. Md. 1979); *see* Raus v. Brotherhood Ry. Carmen, 663 F.2d 791, 797-98 (8th Cir. 1981); Richins v. Southern Pac. Co., 620 F.2d 761, 762-63 (10th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981).

The scope of the Supreme Court's futility exception, however, is unclear, leading to confusion in the lower courts.[7] Although their interpretations of the exception vary, courts are uniform in adopting a restrictive approach toward hearing an employee's claims against both employer and union.[8] This Note examines these court decisions and contends that the consideration underlying the futility exception, that of a fair trial, is not properly addressed by lower courts. Adequate protection of an employee's right to a fair hearing mandates that in every instance when he alleges a grievance against his employer and a breach of the duty of fair representation against his union, the two actions should be heard in federal court.

## I. The National Railroad Adjustment Board

In 1934, Congress amended the Railway Labor Act (RLA)[9] and created the NRAB.[10] The purpose of the Board is to provide final

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7. The minority view allows into federal court those claims that do not involve contractual interpretation. Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747, 756-57 (3d Cir. 1977); Connor v. Brotherhood of Ry., Airline & S.S. Clerks, 496 F. Supp. 154, 157 (M.D. Pa. 1980). The majority of courts accept jurisdiction when collusion between union and carrier is alleged. Raus v. Brotherhood Ry. Carmen, 663 F.2d 791, 798 (8th Cir. 1981); Richins v. Southern Pac. Co., 620 F.2d 761, 762-63 (10th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981); Price v. Southern Pac. Transp. Co., 586 F.2d 750, 752 (9th Cir. 1978); O'Mara v. Erie Lackawanna R.R., 407 F.2d 674, 679 (2d Cir. 1969), *aff'd sub nom.* Czosek v. O'Mara, 397 U.S. 25 (1970); Smith v. B & O R.R., 473 F. Supp. 572, 578 (D. Md. 1979); *see* Harrison v. United Transp. Union, 530 F.2d 558, 562-63 (4th Cir. 1975) (per curiam), *cert. denied*, 425 U.S. 958 (1976).

8. *See infra* notes 43-74 and accompanying text.

9. 45 U.S.C. §§ 151-188 (1976). The RLA incorporated past railroad practices and parts of prior legislation in an attempt to maintain peace and stability in the railway industry. Union Pac. R.R. v. Sheehan, 439 U.S. 89, 94 (1978) (per curiam); Union Pac. R.R. v. Price, 360 U.S. 601, 609 (1959); Brotherhood of R.R. Trainmen v. Denver & Rio Grande W. R.R., 290 F.2d 266, 268 (10th Cir. 1960), *cert. denied*, 366 U.S. 966 (1961). The Act mandated mediation as the primary means of resolving labor disputes, and urged voluntary arbitration if this method should fail. National Mediation Board, Administration of the Railway Labor Act 21 (1970) [hereinafter cited as Administration of the RLA]; Risher, *The Railway Labor Act*, 12 B.C. Indus. & Com. L. Rev. 51, 58, 60 (1970). In addition, the RLA provided for the establishment of local and regional adjustment boards to interpret and apply railroad labor agreements. Railway Labor Act, ch. 347, § 3, 44 Stat. 577, 578 (1926) (current version at 45 U.S.C. § 153 (1976)); *accord* Union Pac. R.R. v. Price, 360 U.S. 601, 609 (1959).

10. 45 U.S.C. § 153 (1976). After a dispute is processed through a railroad's local grievance machinery, it may be appealed by either party to the appropriate division of the NRAB. *Id.* § 153 First (i) (1976); *see* Union Pac. R.R. v. Price, 360 U.S. 601, 604 (1959). The NRAB never acts as a unit, but operates instead as four separate divisions, each one responsible for overseeing designated areas of employment within the railway industry. 45 U.S.C. § 153 First (h) (1976); *accord* Administration of the RLA, *supra* note 9, at 82. The Board is composed of 34 members, representing in equal numbers, carriers and unions. *Id.* at 82-83.

disposition[11] of all "minor disputes"[12]—those "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions."[13] In requiring

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11. 45 U.S.C. § 153 First (m) (1976); *see* Brotherhood of Locomotive Eng'rs v. Louisville & N.R.R., 373 U.S. 33, 38-39 (1963); Union Pac. R.R. v. Price, 360 U.S. 601, 613-14 (1959); Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 34 (1957). The Amendment provided that NRAB awards "shall be final and binding upon both parties to the dispute, *except insofar as they shall contain a money award.*" Railway Labor Act, ch. 691, § 3 First (m), 48 Stat. 1189, 1191 (1934) (emphasis added) (current version at 45 U.S.C. § 153 First (m) (1976)). In 1965, the Supreme Court, in Gunther v. San Diego & A.E. Ry., 382 U.S. 257 (1965), held that an NRAB decision should not be reviewable merely because part of it involved a money award. *Id.* at 264. A year later, Congress retracted the exception in the statute; all awards are now final. 45 U.S.C. § 153 First (m) (1976).

12. Union Pac. R.R. v. Sheehan, 439 U.S. 89, 94 (1978); Gunther v. San Diego & A.E. Ry., 382 U.S. 257, 261 (1965); Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711, 723-24 (1945), *aff'd on rehearing*, 327 U.S. 661 (1946); Chicago & N.W. Transp. Co. v. United Transp. Union, 656 F.2d 274, 278 (7th Cir. 1981); McKinney v. International Ass'n of Machinists, 624 F.2d 745, 748 (6th Cir. 1980). The amendment also abolished the United States Board of Mediation, which had been created by the 1926 Act, and established in its stead the National Mediation Board (NMB). 45 U.S.C. §§ 154-155 (1976). The NMB mediates "major disputes"—those "concerning changes in rates of pay, rules, or working conditions not adjusted by the parties," *id.* § 155 First (a), and "[a]ny other dispute not referable to the [NRAB]." *Id.* § 155 First (b); *accord* Detroit & Toledo Shore Line R.R. v. United Transp. Union, 396 U.S. 142, 148, 149 n.14 (1969); Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711, 722-23 (1945), *aff'd on rehearing*, 327 U.S. 661 (1946). If the NMB is unsuccessful at resolving a major dispute, the parties may consent to voluntary arbitration. 45 U.S.C. § 155 First (b) (1976). "If one party declines arbitration, however, then, unless the President of the United States creates an emergency board to investigate the dispute, either party can resort to self-help, including, for the union, a strike." St. Louis S.W. Ry. v. United Transp. Union, 646 F.2d 230, 231 (5th Cir. 1981). Parties with "minor" disputes, however, may not resort to self-help. *Id.* at 231-32; *see* Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711, 725 (1945), *aff'd on rehearing*, 327 U.S. 661 (1946).

13. 45 U.S.C. § 153 First (i) (1976). Two major flaws became evident in the provision of the original RLA, which called for local and regional adjustment boards. Northrup, *The Railway Labor Act: A Critical Reappraisal*, 25 Indus. & Lab. Rel. Rev. 3, 4 (1971); Risher, *supra* note 9, at 71; Seidenberg, *Grievance Adjustment in the Railroad Industry*, in The Railway Labor Act at Fifty 209, 209-12 (C. Rehmus ed. 1976). First, establishment of these boards and adherence to their authority were on a consensual basis only. Railway Labor Act, ch. 347, § 3, 44 Stat. 577, 578 (1926) (current version at 45 U.S.C. § 153 (1976)). Consequently, the parties often encountered difficulty in both setting up the adjustment boards, and once established, enforcing their decisions. Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 35-36 (1957); H.R. Rep. No. 1944, 73d Cong., 2d Sess. 3 (1934), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor & Public Welfare, 93d Cong., 2d Sess., Legislative History of the Railway Labor Act, As Amended 1355 (Comm. Print 1974). Second, the statute provided no effective method for breaking the deadlocks which often resulted on these structurally bipartisan boards. Union Pac. R.R. v. Price, 360 U.S. 601, 610 (1959); Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J., 567, 574 (1937); Seidenberg, *supra*, at 212; *see* Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711, 725-26

equal representation of carriers and unions on the NRAB,[14] Congress recognized that frequent deadlocks would occur.[15] To protect against such eventuality, Congress provided that a neutral referee be appointed to reach a decision when the Board is unable to secure a majority vote.[16]

The Adjustment Board is unique in United States labor law. It is "the only administrative tribunal, federal or state, which has ever been set up in this country for the purpose of rendering judicially enforceable decisions in controversies arising out of the interpretation of contracts."[17] In contrast, employers of industries governed by the National Labor Relations Act (NLRA)[18] are required to bargain disputes with employees, but there is no compulsion or even a prescribed method for finalizing these grievances.[19]

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(1945), *aff'd on rehearing*, 327 U.S. 661 (1946). The 1934 amendment was designed to eliminate both these shortcomings. Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 36-37 (1957); Elgin, Joliet & E. Ry. v. Burley, 325 U.S. 711, 727-28 (1945), *aff'd on rehearing*, 327 U.S. 661 (1946).

14. 45 U.S.C. § 153 First (a) (1976). To qualify for representation on the Board, the union had to be "national in scope." *Id.*

15. S. Rep. No. 1065, 73d Cong., 2d Sess. 1 (1934), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor & Public Welfare, 93d Cong., 2d Sess., Legislative History of the Railway Labor Act, As Amended 821 (Comm. Print 1974); *see* Union Pac. R.R. v. Price, 360 U.S. 601, 610-13 (1959); Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 36-37 (1957).

16. 45 U.S.C. § 153 First (*l*) (1976). The statute provides that the division hearing the grievance select the referee. In instances where the division cannot agree on an appointment within 10 days following the deadlock, the division must turn to the NMB, which is then responsible for the appointment of a referee. *Id.*

17. Garrison, *supra* note 13, at 567; *accord* Risher, *supra* note 9, at 71.

18. 29 U.S.C. §§ 151-187 (1976). The NLRA is the primary body of law governing labor relations in private industry. R. Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining ch. 1, at 1 (1976). It was enacted in several parts over the period 1935-1959 and was "an effort by the Congress to create the conditions of industrial peace in interstate commerce by removing obstacles to—indeed, encouraging—the formation of labor unions as an effective voice for the individual worker." *Id.*

19. 29 U.S.C. § 158(d) (1976); *accord* H.K. Porter Co., Disston Div.-Danville Works v. NLRB, 397 U.S. 99, 106 (1970); McCourt v. California Sports, Inc., 600 F.2d 1193, 1201 (6th Cir. 1979); Wal-lite Div. of U.S. Gypsum Co. v. NLRB, 484 F.2d 108, 111 (8th Cir. 1973); *see* R. Gorman, *supra* note 18, ch. 19, § 5, at 393; Risher, *supra* note 9, at 71 n.70. The favored method for settling grievances, however, is through "final adjustment by a method agreed upon by the parties." Labor Management Relations Act, 29 U.S.C. § 173(d) (1976); *accord* United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 565, 566 (1960); United Steelworkers of Am. v. Warriers & Gulf Navigation Co., 363 U.S. 574, 578 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960). Accordingly, most collective bargaining contracts provide for the resolution of grievances through internal machinery, culminating in voluntary arbitration. R. Gorman, *supra* note 18, ch. 23, § 3, at 544.

If a carrier does not comply with an NRAB decision within a specified time, a grievant may file a petition in district court;[20] the court is then empowered to enforce the Adjustment Board's order.[21] In contrast to this unrestricted power to enforce an NRAB order, however, a court's power to review an NRAB decision is severely limited.[22] Judicial review is permitted "for failure of the division to comply with the requirements [of the RLA,] for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order."[23] In addition, Board decisions are reviewable if they are violative of due process.[24]

The Board was created with the power to hear grievances brought by either the employee's representative—the union—or the employee

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20. 45 U.S.C. § 153 First (p) (1976).

21. Southern Pac. Co. v. Brotherhood of Locomotive Firemen & Enginemen, 393 F.2d 345, 346 (D.C. Cir. 1967), *cert. denied*, 391 U.S. 913 (1968); *see* 45 U.S.C. § 153 First (p) (1976).

22. Union Pac. R.R. v. Sheehan, 439 U.S. 89, 91 (1978) (per curiam); Del Casal v. Eastern Airlines, Inc., 634 F.2d 295, 298 (5th Cir.), *cert. denied*, 50 U.S.L.W. 3278 (Oct. 13, 1981); Eastern Air Lines, Inc. v. Transport Workers Union, 580 F.2d 169, 172 (5th Cir. 1978); Diamond v. Terminal Ry. Ala. State Docks, 421 F.2d 228, 233 (5th Cir. 1970); James v. Union Pac. R.R., 93 L.R.R.M. (BNA) 2857, 2858 (D. Neb. 1976). Before 1966, a carrier could refuse to comply with an award granted to an employee, and the employee's only remedy was to retry the case in court. If, however, the employee lost his case before the Board, there was no judicial review available to him. H.R. Rep. No. 1114, 89th Cong., 1st Sess. 14-15, *reprinted in* Senate Subcomm. on Labor, Comm. on Labor & Public Welfare, 93d Cong., 2d Sess., Legislative History of the Railway Labor Act, As Amended 1321 (Comm. Print 1974). The 1966 Amendments added a section that afforded an equal degree of review to both parties. 45 U.S.C. § 153 First (p) (1976).

23. 45 U.S.C. § 153 First (q) (1976). Courts adhere strictly to this standard. The Supreme Court has stated: "We have time and again emphasized that this statutory language means just what it says." Union Pac. R.R. v. Sheehan, 439 U.S. 89, 93 (1978) (per curiam); *accord* Skidmore v. Consolidated Rail, 619 F.2d 157, 159 (2d Cir. 1979), *cert. denied*, 449 U.S. 854 (1980); Denver & Rio Grande W. R.R. v. Blackett, 538 F.2d 291, 293 (10th Cir. 1976); Roberts v. Lehigh Coal & Navigation Co., 497 F. Supp. 56, 58 (E.D. Pa. 1979). The Board's "order can be reversed by the courts if it is found to be 'actually and undisputably without foundation in reason or fact' or 'wholly baseless and without reason.' " Kotakis v. Elgin, Joliet & E. Ry., 520 F.2d 570, 574 (7th Cir.) (citations omitted) (quoting Brotherhood of R.R. Trainmen v. Central of Ga. Ry., 415 F.2d 403, 414 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970); Gunther v. San Diego & A.E. Ry., 382 U.S. 257, 261 (1965)), *cert. denied*, 423 U.S. 1016 (1975).

24. O'Neill v. Public Law Bd. No. 550, 581 F.2d 692, 694 (7th Cir. 1978); Kotakis v. Elgin, Joliet & E. Ry., 520 F.2d 570, 574 (7th Cir.), *cert denied*, 423 U.S. 1016 (1975); Rosen v. Eastern Air Lines, Inc., 400 F.2d 462, 464 (5th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 959 (1969); Brotherhood of Maintenance of Way Employees v. St. Johnsbury & Lamoille Cty. R.R., 512 F. Supp. 1079, 1084 (D. Vt. 1981); Consolidated Rail v. Delaware & Hudson Ry., 499 F. Supp. 967, 971 (E.D. Pa. 1980).

himself.[25] The vast majority of cases, however, are brought by the unions;[26] an individual is unlikely to be as successful in front of the Board as is his better-equipped and more experienced representative.[27] It is settled law that jurisdiction of the Board is exclusive; the NRAB is the employee's sole forum for resolving any minor disputes he may have with his carrier-employer.[28] In contrast, the Board has no authority to hear breach of fair representation claims against unions.[29] Employees must bring these complaints in federal court.

When an employee brings a claim against both his employer and union, however, a problem arises as to the proper forum for resolving the conflict. The established rules dictate that such a suit be bifur-

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25. 45 U.S.C. § 153 First (i)-(j) (1976); *see* Elgin, Joliet & E. Ry. v. Burley, 327 U.S. 661, 666 (1946); O'Mara v. Erie Lackawanna R.R., 407 F.2d 674, 678 (2d Cir. 1969), *aff'd sub nom.* Czosek v. O'Mara, 397 U.S. 25 (1970); Pacilio v. Pennsylvania R.R., 381 F.2d 570, 572 (2d Cir. 1967). This right accorded to individuals does not, however, excuse the union from its duty of fair representation. Conley v. Gibson, 355 U.S. 41, 47 (1957); O'Mara v. Erie Lackawanna R.R., 407 F.2d 674, 678 (2d Cir. 1969), *aff'd sub nom.* Czosek v. O'Mara, 397 U.S. 25 (1970).

26. Seidenberg, *supra* note 13, at 236. In 1975, of 930 cases submitted to the First division of the Board, 37 were filed by individuals. *Id.*

27. *E.g.*, Conley v. Gibson, 355 U.S. 41, 47 (1957); Schum v. South Buffalo Ry., 496 F.2d 328, 331 (2d Cir. 1974); O'Mara v. Erie Lackawanna R.R., 407 F.2d 674, 678 (2d Cir. 1969), *aff'd sub nom.* Czosek v. O'Mara, 397 U.S. 25 (1970); Hennebury v. Transport Workers Union, 485 F. Supp. 1319, 1324 (D. Mass. 1980).

28. Union Pac. R.R. v. Sheehan, 439 U.S. 89, 94 (1978) (per curiam); Glover v. St. Louis-San Francisco Ry., 393 U.S. 324, 328 (1969); Raus v. Brotherhood Ry. Carmen, 663 F.2d 791, 794 (8th Cir. 1981); McKinney v. International Ass'n of Machinists, 624 F.2d 745, 748 (6th Cir. 1980); Richins v. Southern Pac. Co., 620 F.2d 761, 762 (10th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981). The courts were initially reluctant to grant exclusive jurisdiction to the Adjustment Board. In 1941, the Supreme Court ruled that exhaustion of administrative remedies was merely an RLA alternative to judicial proceedings, not a requirement. Moore v. Illinois Cent. R.R., 312 U.S. 630, 635-36 (1941). The *Moore* Court also held that claims for unlawful discharge were subject to state law and were therefore immune to the requirement of exhaustion before the NRAB. *Id.* at 634. A later case repudiated both holdings, Brotherhood of R.R. Trainmen v. Chicago Riv. & Ind. R.R., 353 U.S. 30, 39 (1957), and *Moore* was finally overruled by Andrews v. Louisville & N.R.R., 406 U.S. 320, 326 (1972). "[T]he notion that the grievance and arbitration procedures provided for minor disputes in the [RLA] are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law." *Id.* at 322.

29. Czosek v. O'Mara, 397 U.S. 25, 27-28 (1970); Glover v. St. Louis-San Francisco Ry., 393 U.S. 324, 328 (1969); Conley v. Gibson, 355 U.S. 41, 44-45 (1957); Raus v. Brotherhood Ry. Carmen, 663 F.2d 791, 794 (8th Cir. 1981); Richins v. Southern Pac. Co., 620 F.2d 761, 763 (10th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981). The statutory duty of fair representation was first enunciated in Steele v. Louisville & N.R.R., 323 U.S. 192, 199 (1944). This doctrine provides that a union is obligated to "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Vaca v. Sipes, 386 U.S. 171, 177 (1967); *accord* Humphrey v. Moore, 375 U.S. 335, 342 (1964).

cated, the dispute with the union being heard in federal court, and the grievance against the railroad being sent back to the NRAB.[30] In *Glover v. St. Louis-San Francisco Railway*,[31] however, the Supreme Court held that when an employee brings a claim alleging joint discrimination by his union and employer, the entire case is properly heard in federal court.[32] The question left unanswered by *Glover* is whether a court will hear a grievance against an employer along with a breach of fair representation claim against a union if the two claims, while independent, arise from the same set of facts.

## II. *Glover* AND THE IMPROPER APPROACH OF THE LOWER COURTS

In *Glover*, a group of black employees claimed that they were the victims of a tacit discriminatory agreement between their employer and union to deny them promotions in violation of the collective bargaining agreement.[33] The plaintiffs claimed that they had presented their grievance to union and company representatives on several occasions, but at best had been ignored, and at worst rebuffed and taunted.[34]

The Supreme Court first noted that a suit against the union does not fall within the jurisdiction of the NRAB.[35] Furthermore, because the grievance involved "employees on the one hand and the union and management together on the other . . . the [Adjustment Board had] no power to order the kind of relief necessary even with respect to the railroad alone, in order to end entirely abuses of the sort alleged."[36] The joint discrimination, coupled with the employees' unsuccessful attempts to present their claims to both the employer and the union, created a situation in which any attempt to pursue remedies from representatives of the very organizations being sued would most likely meet with failure.[37] The Court, therefore, allowed federal court

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30. *See supra* notes 28-29 and accompanying text. Under the NLRA, an employee is permitted to join his employer and union in a suit in federal court. Vaca v. Sipes, 386 U.S. 171, 187 (1967); Geddes v. Chrysler Corp., 608 F.2d 261, 265 (6th Cir. 1979); NLRB v. Local 485, Int'l Union of Electrical, Radio & Machine Workers, AFL-CIO, 454 F.2d 17, 21 (2d Cir. 1972).

31. 393 U.S. 324 (1969).

32. *Id.* at 328-29.

33. *Id.* at 325-27. There were also five white plaintiffs. *Id.*

34. *Id.* at 326-27.

35. *Id.* at 328-29.

36. *Id.* at 329.

37. *Id.* at 331. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944), was cited in *Glover*. 393 U.S. at 329. *Steele* is a landmark case most noted for holding that unions are obligated to represent all employees in a non-discriminatory fashion. 323 U.S. at 198-99. More relevant here, however, is *Steele's* discussion of why the black plaintiff in that case could not be successful in a suit brought before the NRAB. First, at that time the Board consistently refused to hear claims brought by individuals. *Id.* at 205.

jurisdiction over both union and railroad.[38]

Prior to *Glover*, an employee could bring a grievance against his employer to federal court only when the actions of either the employer or the union effectively precluded the employee from seeking relief through administrative procedures.[39] The exception in *Glover* further relaxed the restriction on the employee's access to the federal courts. An employee with claims against his employer and union can now bring both defendants to court "where the effort to proceed formally with contractual or administrative remedies would be wholly futile."[40] Futility requires something less than the earlier exception of effective preclusion: Although an employee might not be precluded from bringing his claim to the NRAB, his attempt to procure a fair hearing could still be futile. The futility standard, however, has proved to be problematic. The *Glover* Court declined to afford the standard a clear definition, and a subsequent Supreme Court case expressly avoided the issue.[41] Lower courts have not

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"Further, since § 3 First (c) permits the national labor organizations chosen by the majority of the crafts to 'prescribe the rules under which the labor members of the Adjustment Board shall be selected' and to 'select such members and designate the division on which each member shall serve,' [the plaintiffs] would be required to appear before a group which is in large part chosen by the [defendants] against whom their real complaint is made." *Id.* at 206. The *Glover* court relied on this discussion in concluding that it would be unfair to affirm the dismissals of the lower courts. 393 U.S. at 330-31.

38. 393 U.S. at 329. In so doing, the Supreme Court reversed two lower court decisions. The district court had dismissed the case, citing plaintiffs' failure to exhaust the remedies provided by the collective bargaining agreement and by the NRAB. Glover v. St. Louis-San Francisco R.R., No. 65-477, slip op. at 2 (N.D. Ala. July 28, 1966), *aff'd per curiam*, 386 F.2d 452 (5th Cir. 1967), *rev'd*, 393 U.S. 324 (1969). Responding to plaintiffs' argument that these remedies were inadequate because of the nature of their complaint, the court stated that, "[t]o indulge such a presupposition would be to sterilize procedures adopted to promote industrial peace." *Id.* The court of appeals affirmed the ruling. 386 F.2d 452 (5th Cir. 1967) (per curiam), *rev'd*, 393 U.S. 324 (1969).

39. Vaca v. Sipes, 386 U.S. 171, 185 (1967). In *Vaca*, a case not brought under the RLA, the Court spoke of this exception as arising under two situations. The first is when the employer repudiates the grievance procedures by its own wrongful actions. The second is when the union has the "sole power . . . to invoke the higher stages of the grievance procedure, and . . . prevent[s the plaintiff] from exhausting his contractual remedies by [its] wrongful refusal to process the grievance." *Id.*

40. Glover v. St. Louis-San Francisco Ry., 393 U.S. 324, 330 (1969).

41. Czosek v. O'Mara, 397 U.S. 25, 29-30 (1970). In *Czosek*, the plaintiff had brought suit against his carrier-employer for wrongful discharge and against his union for breach of its duty of fair representation. O'Mara v. Erie Lackawanna R.R., 407 F.2d 674, 676 (2d Cir. 1969), *aff'd sub nom.* Czosek v. O'Mara, 397 U.S. 25 (1970). The court of appeals reversed the district court's dismissal of the complaint against the union, *id.* at 679, but the dismissal of the complaint against the carrier was upheld, with the provision that the plaintiffs could amend their complaint to allege participation of the railroad in the union's action. *Id.* at 676. The employees did not appeal the Second Circuit decision, and thus the Supreme Court had "no

established a uniform interpretation of the futility exception.[42]

A minority of the lower courts recognize that the *Glover* holding establishes an exception to accepted jurisdictional rules.[43] In defining that exception, however, the minority seemingly creates another standard, independent of futility: A court may accept jurisdiction over both defendants only when the suit is primarily against the union and does not involve the interpretation of the underlying collective bargaining agreement.[44] Those claims that do require contractual interpretation are returned to the Board.[45]

In *Goclowski v. Penn Central Transportation Co.*,[46] for example, plaintiffs claimed that their employer and union had entered into a merger agreement in violation of the seniority rights afforded employees by a collective bargaining agreement.[47] Plaintiffs contested the merger agreement on two distinct grounds.[48] The employees first alleged that the agreement was an unlawful extension of the collective bargaining agreement.[49] The Circuit Court refused jurisdiction on this portion of the suit, stating: "No doubt may be entertained that this claim requires close examination of the pertinent collective bargaining agreements between the Union and the Railroad. We defer to

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occasion to consider whether under federal law . . . the employer may always be sued with the union when a single series of events gives rise to claims against the employer for breach of contract and against the union for breach of the duty of fair representation or whether, as the Court of Appeals held, when there are no allegations tying union and employer together, the union is suable in the District Court for breach of duty but resort must be had to the Adjustment Board for a remedy against the employer." 397 U.S. at 29-30. The Court did hold that union defendants could be sued alone for breach of their duty and that they would be held liable only for the damage they caused. *Id.* at 28-29.

42. *See infra* notes 43-74 and accompanying text. *Compare* Raus v. Brotherhood Ry. Carmen, 663 F.2d 791, 798-99 (8th Cir. 1981) (*Glover* applicable when collusion exists between defendants), *with* Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747, 756 n.13 (3d Cir. 1977) (*Glover* not applicable "when the basis of the claim is primarily construction and interpretation of existing collective bargaining agreements").

43. Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747, 756 n.13 (3d Cir. 1977); Connor v. Brotherhood of Ry., Airline & S.S. Clerks, 496 F. Supp. 154, 157 n.3 (M.D. Pa. 1980).

44. Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747, 756-57 (3d Cir. 1977); *see* Connor v. Brotherhood of Ry., Airline & S.S. Clerks, 496 F. Supp. 154, 157 (M.D. Pa. 1980).

45. Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747, 755-57 (3d Cir. 1977); Connor v. Brotherhood of Ry., Airline & S.S. Clerks, 496 F. Supp. 154, 157 (M.D. Pa. 1980).

46. 571 F.2d 747 (3d Cir. 1977).

47. *Id.* at 750-51.

48. *Id.* at 753.

49. *Id.*

the expertise of the Board in construing the railroad labor contracts."[50] The court thus returned the claim to the NRAB.[51]

The employees then argued that the failure to obtain employee ratification before the contract was adopted rendered the agreement invalid.[52] The court stated that this portion of the suit primarily involved employees and their union, and therefore could not properly be heard by the NRAB.[53] The court thus exercised jurisdiction over both the union and the railroad, reasoning that this claim did not involve interpretation of a collective bargaining agreement but rather required the application of common-law principles with respect to the formation of a contract. The expertise of the Board was, therefore, not necessary, and the defendants were properly in court.[54]

The majority of courts, however, do not look to whether the dispute involves interpretation of an underlying collective bargaining agreement. These courts, in recognizing the propriety of the futility exception,[55] deem futility satisfied, and the entire case properly heard in court, when it is alleged that the union and employer acted collusively to deny an employee his rights.[56] Conversely, when no such collusion is alleged, the suit against the union should be tried in court, but the employee's related dispute with his employer must be returned to the Board. The requirement of collusion, however, fails to further clarify the futility exception. The majority of courts have not articulated the

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50. *Id.* at 755. The court explicitly stated that it did not recognize *Glover*'s applicability to a suit that involves contractual interpretation. *Id.* at 756 n.13. Other courts have criticized *Goclowski*'s interpretation of *Glover*. Raus v. Brotherhood Ry. Carmen, 663 F.2d 791, 798 (8th Cir. 1981); Richins v. Southern Pac. Co., 620 F.2d 761, 763 n.3 (10th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981).

51. 571 F.2d at 755.

52. *Id.* at 753.

53. *Id.* at 755-56. The court cited *Glover* for its similar facts. *Id.* at 756.

54. *Id.* Applying the rationale that the primary claim was against the union, the court then accepted jurisdiction over a claim that the union and railroad had conspired to breach a duty of fair representation by failing to obtain ratification for the contract. *Id.* at 759.

55. *See* Raus v. Brotherhood Ry. Carmen, 663 F.2d 791, 797-98 (8th Cir. 1981); Richins v. Southern Pac. Co., 620 F.2d 761, 762-63 (10th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981); Price v. Southern Pac. Transp. Co., 586 F.2d 750, 751-52 (9th Cir. 1978); Harrison v. United Transp. Union. 530 F.2d 558, 562-63 (4th Cir. 1975) (per curiam), *cert. denied*, 425 U.S. 958 (1976); O'Mara v. Erie Lackawanna R.R., 407 F.2d 674, 679 (2d Cir. 1969), *aff'd sub nom.* Czosek v. O'Mara, 397 U.S. 25 (1970); Smith v. B & O R.R., 473 F. Supp. 572, 578 (D. Md. 1979).

56. Raus v. Brotherhood Ry. Carmen, 663 F.2d 791, 798 (8th Cir. 1981); Richins v. Southern Pac. Co., 620 F.2d 761, 762 (10th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981); Price v. Southern Pac. Transp. Co., 586 F.2d 750, 752 (9th Cir. 1978); O'Mara v. Erie Lackawanna R.R., 407 F.2d 674, 679 (2d Cir. 1969), *aff'd sub nom.* Czosek v. O'Mara, 397 U.S. 25 (1970); Smith v. B & O R.R., 473 F. Supp. 572, 578 (D. Md. 1979); *see* Harrison v. United Transp. Union, 530 F.2d 558, 562-63 (4th Cir. 1975) (per curiam), *cert. denied*, 425 U.S. 958 (1976).

elements necessary to find collusion, but an analysis of the relevant cases reveals that such clarification is not necessary. Courts have exercised jurisdiction over a defendant railroad only if the union has effectively precluded the employee from bringing an action to the NRAB.[57] The courts are thus adhering to the narrower exception that was established prior to *Glover* while virtually ignoring that of futility.

In *Richins v. Southern Pacific Co.*,[58] for example, the Tenth Circuit held that for an employee to bring both actions before the court, "the alleged facts, viewed in a light most favorable to plaintiffs, [must be] consistent with a pattern of collusion between Union and Railroad."[59] Having found that the requirement was met, the court accepted jurisdiction over both union and railroad defendants.[60] The facts of the case, however, while not indicating what collusive activity actually occurred, did reveal the consequences of that activity. In *Richins*, the employer had violated its contract with plaintiffs by awarding seniority rights to workers of a merging railroad.[61] Plaintiffs brought their complaint to the union. Instead of protecting their rights, however, the union consistently misled plaintiff-employees[62]

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57. Richins v. Southern Pac. Co., 620 F.2d 761, 762 & n.2 (10th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981); Schum v. South Buffalo Ry., 496 F.2d 328, 332 (2d Cir. 1974); Sisson v. Atchison, T. & S.F. Ry., 92 L.R.R.M. (BNA) 3673, 3674 (D. Kan. 1976); *see* James v. Union Pac. R.R., 93 L.R.R.M. (BNA) 2857, 2859 (D. Neb. 1976); *cf.* Harrison v. United Transp. Union, 530 F.2d 558, 560-61 (4th Cir. 1975) (per curiam) (court refused to exercise jurisdiction over the railroad even though the union's wrongful action had prevented plaintiff from filing a grievance with the Board), *cert. denied*, 425 U.S. 958 (1976). When the element of effective preclusion by the union is not present, but collusion is alleged, courts do not hear the case against the railroad. Raus v. Brotherhood Ry. Carmen, 663 F.2d 791, 798 (8th Cir. 1981); McKinney v. International Ass'n of Machinists, 624 F.2d 745, 747 (6th Cir. 1980); Horton v. United Transp. Union, 92 L.R.R.M. (BNA) 3546, 3546-47 (S.D. Ga. 1976); *cf.* O'Mara v. Erie Lackawanna R.R., 407 F.2d 674, 679 (2d Cir. 1969), *aff'd sub nom.* Czosek v. O'Mara, 397 U.S. 25 (1970) (complaint against union reinstated with leave to plaintiffs to amend their complaint to allege collusion between defendants). *But see* Price v. Southern Pac. Transp. Co., 586 F.2d 750, 754 (9th Cir. 1978) (court exercised jurisdiction over claims against union and railroad but then dismissed both cases on summary judgment).

58. 620 F.2d 761 (10th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981).

59. *Id.* at 762. The court considered two other factors in reaching its conclusion. First, it expressed concern that the plaintiff might not be able to obtain complete relief in court if the railroad were not a party, because he was requesting reinstatement with seniority. Second, a bifurcated proceeding would constitute a waste of judicial resources and could lead to inconsistent results. *Id.* at 762-63.

60. *Id.* at 763.

61. *Id.* at 761-62. The claim originated from the dovetailing of two seniority rosters following the merger of two railroads. Plaintiffs alleged they were demoted several times, and finally furloughed, while workers who should have been demoted first according to contract, were retained in their original positions. *Id.* at 762.

62. *Id.* The union alleged that it refused to hear plaintiffs' complaint because it lacked merit. *Id.*

and effectively precluded them from filing a timely claim against the railroad with the NRAB.[63] Under these circumstances, it would not merely have been futile for plaintiffs to bring their grievance to the Board; it would have been impossible. The court, therefore, agreed to hear these claims, not because the union conspired in any way with the railroad to deprive these plaintiffs of their rights, but because the union's wrongful actions forced the plaintiffs to seek relief in court.

A comparison of *Raus v. Brotherhood Railway Carmen*[64] with the *Richins* decision confirms that the majority of courts are in fact applying the effective preclusion standard in determining whether to bifurcate the employee's claim against employer and union. The *Raus* court, like the court in *Richins*, required collusion but failed to define it.[65] Furthermore, the facts of the two cases are strikingly similar. In both, plaintiffs claimed that their employer had violated a collective bargaining agreement, and that subsequently, the union had failed to represent them in their claim.[66] Unlike *Richins*, however, the union's activities in *Raus* did not prevent plaintiffs from filing a claim with the NRAB. Thus, the *Raus* court concluded that the claims should be bifurcated.[67] Presumably, if the plaintiffs had been precluded from bringing their claim to the Board, the court would have reached an opposite conclusion.

The effective preclusion standard implicit in the holdings in *Richins* and *Raus* was explicitly enunciated by the Second Circuit in *Schum v. South Buffalo Railway*.[68] In this case, there was no discussion of collusion. Rather, the court looked to the effect of the union's activities on the employee's ability to pursue his claim in front of the

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63. *Id.* at 762 & n.2.

64. 663 F.2d 791 (8th Cir. 1981).

65. *Compare id.* at 798 ("good faith allegations and facts supporting those allegations indicating collusion"), *with* Richins v. Southern Pac. Co., 620 F.2d 761, 762 (10th Cir. 1980) ("alleged facts, viewed in a light most favorable to plaintiffs', are consistent with a pattern of collusion"), *cert. denied*, 449 U.S. 1110 (1981).

66. *Compare* Raus v. Brotherhood Ry. Carmen, 663 F.2d 791, 793 (8th Cir. 1981) (complaint alleged railroad had not allowed employees to enter an apprentice training program and union had violated duty of fair representation by not enforcing employees' rights), *with* Richins v. Southern Pac. Co., 620 F.2d 761, 761 (10th Cir. 1980) (complaint alleged that railroad layoffs violated collective bargaining agreement and union violated duty of fair representation by failure to enforce the agreement), *cert. denied*, 449 U.S. 1110 (1981).

67. 663 F.2d at 799. In so doing, the court of appeals affirmed the lower court's decision as to the railroad, but reversed the lower court's holding as to the union. *Id.* The district court relied on *Goclowski* in stating that, because the primary cause of action was against the railroad and the claim against the union arose as a result of the primary claim, neither suit was properly in federal court. Raus v. Brotherhood Ry. Carmen, 498 F. Supp. 1294, 1297-98 (S.D. Iowa 1980), *aff'd in part, rev'd in part*, 663 F.2d 791 (8th Cir. 1981). The court of appeals explicitly rejected this reasoning. 663 F.2d at 797.

68. 496 F.2d 328, 331-32 (2d Cir. 1974).

Board.[69] The court found that Schum had made a good faith attempt to exhaust the contractual and administrative remedies of bringing the suit before the NRAB.[70] Because the union's activities had precluded a Board hearing,[71] however, Schum was entitled to his day in court against both union and employer.[72]

While the majority's effective preclusion standard and the minority's contractual interpretation standard represent distinct approaches to the issue of court jurisdiction over controversies normally decided by the Board, neither approach is broad enough to provide the employee with the protection contemplated by the *Glover* Court in establishing its futility standard. The futility exception was created by balancing the congressional preference for exclusive jurisdiction of the Board[73] with the concern for providing a litigant with a fair opportunity to be heard.[74] The flaw in the lower courts' approaches is that they fail to properly weigh these two considerations.

## III. The Proper Balancing of the Concerns Behind the Futility Exception

In creating the NRAB, Congress recognized that to promote stability in the railway industry, a forum was needed to provide efficient and effective resolutions of management-labor disputes.[75] To best

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69. *Id.* at 330-31. The court relied on both the futility and effective preclusion exceptions in reaching its decision. *See id.*

70. *Id.* at 332.

71. *Id.* at 329-30. Schum had sustained injuries that the carrier claimed hindered his ability to work. Several hearing dates were scheduled, but Schum notified his employer that none of the dates were satisfactory to him, and failed to appear. He was subsequently terminated for insurbordination. *Id.* at 329. Schum contacted his union for aid. The union agreed to handle his complaint, but only completed the first step of the grievance procedure; after presenting the complaint to a high-ranking official of the railroad, the union failed to file a timely complaint with the NRAB. *Id.* at 329-30.

72. *Id.* at 331-32.

73. 112 Cong. Rec. H2749 (daily ed. Feb. 9, 1966) (statement of Rep. Younger), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor & Public Welfare, 93d Cong., 2d Sess., Legislative History of the Railway Labor Act, As Amended 1355 (Comm. Print 1974); Note, *Preemption Doctrine and Exhaustion of Administrative Remedies Doctrine Under the Railway Labor Act*, 52 Temp. L.Q. 198, 208 (1979) [hereinafter cited as *Preemption Doctrine*]; *see* Glover v. St. Louis-San Francisco Ry., 393 U.S. 324, 330 (1969).

74. Glover v. St. Louis-San Francisco Ry., 393 U.S. 324, 329-30 (1969). The Supreme Court adds the facts of *Glover* to the "line of cases [in which] the Court has rejected the contention that employees alleging racial discrimination should be required to submit their controversy to 'a group which is in large part chosen by the [defendants] against whom their real complaint is made.' " *Id.* at 330 (citations omitted); *see* Steele v. Louisville & N.R.R., 323 U.S. 192, 205-06 (1944).

75. Union Pac. R.R. v. Sheehan, 439 U.S. 89, 94 (1978) (per curiam); Gunther v. San Diego & A.E. Ry., 382 U.S. 257, 263 (1965); Union Pac. R.R. v. Price, 360 U.S. 601, 609-10 (1959); Slocum v. Delaware, Lackawanna & W.R.R., 339 U.S. 239, 242

effectuate these goals, it was considered essential that these grievances be settled exclusively by the Adjustment Board, outside the court system.[76] The exclusive jurisdiction of the Board is justified by the complexity and unique nature of railway contracts.[77] The interpretation and application of such contracts is best left to the experience and expertise of the management and labor representatives that comprise the Board.[78] In compliance with these considerations, courts strictly adhere to the NRAB's exclusive jurisdiction.

The minority courts, in requiring that all cases involving contractual interpretation be decided by the Adjustment Board, implicitly suggest congressional preference for the Board's exclusive jurisdiction.[79] Because they fail to recognize the countervailing policy consideration of assuring a fair hearing for the employee, however, the minority courts' handling of the issue is inadequate. A judicial determination of whether a particular claim involves contractual interpretation bears no relation to whether an employee will receive a fair hearing.

Whereas the minority courts fail to balance the competing interests, the majority of courts balance the interests but fail to afford sufficient weight to the fairness consideration. The majority courts permit an employee to bring his claims against both the union and employer to court only after the employee has demonstrated that he has been effectively precluded from redress by the Board.[80] Implicit in this standard is the belief that if an employee has the opportunity to bring his claim before the Board, he will have a fair hearing. What these courts fail to perceive is that a Board review of an employee's complaint against his union and employer is inherently unfair.

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(1950); Yawn v. Southern Ry., 591 F.2d 312, 314 (5th Cir.), *cert. denied*, 442 U.S. 934 (1979); Brotherhood of Maintenance of Way Employees v. St. Johnsbury & Lamoille County R.R., 512 F. Supp. 1079, 1083 (D. Vt. 1981).

76. Order of Ry. Conductors v. Pitney, 326 U.S. 561, 565-66 (1946); Yawn v. Southern Ry., 591 F.2d 312, 314 (5th Cir.), *cert. denied*, 442 U.S. 934 (1979); Taylor v. Hudson Rapid Tubes Corp., 362 F.2d 748, 750-51 (3d Cir. 1966); *see supra* note 28 and accompanying text.

77. Elgin, Joliet & E. Ry. v. Burley, 327 U.S. 661, 664-65 (1946); Taylor v. Hudson Rapid Tubes, 362 F.2d 748, 750-51 (3d Cir. 1966); *see* Slocum v. Delaware, Lackawanna & W.R.R., 339 U.S. 239, 243 (1950); Risher, *supra* note 9, at 74.

78. Gunther v. San Diego & A.E. Ry., 382 U.S. 257, 261-62 (1965); Union Pac. R.R. v. Price, 360 U.S. 601, 614 (1959); Slocum v. Delaware, Lackawanna & W.R.R., 339 U.S. 239, 243-44 (1950); Order of Ry. Conductors v. Pitney, 326 U.S. 561, 566 (1946); United Transp. Union v. Burlington N. Inc., 458 F.2d 354, 357 (8th Cir. 1972); Diamond v. Terminal Ry. Ala. State Docks, 421 F.2d 228, 232-33 (5th Cir. 1970).

79. Connor v. Brotherhood of Ry., Airline & S.S. Clerks, 496 F. Supp. 154, 157 (M.D. Pa. 1980); *see* Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747, 755 (3d Cir. 1977).

80. *See supra* notes 55-72 and accompanying text.

An employee who petitions the Board faces a group of representatives partisan in favor of their principals. The NRAB is composed of an equal number of management and union members,[81] with the members of each group being paid by their respective organizations.[82] In the typical situation—where a claimant is represented by his union in a claim against his employer—union members vote as a bloc in the employee's favor and management members vote against him.[83] Congress, in providing for a neutral referee to break these frequent deadlocks, acknowledged the partisanship of the Board.[84] When an employee brings claims against both his employer and union, however, the management and union representatives are likely to vote together and oppose the claims for self-serving purposes. In this situation, the provision for a referee is of little assistance to the individual claimant. The usual protection afforded a plaintiff by judicial review is lacking as well. The RLA established, and courts adhere to,

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81. 45 U.S.C. § 153 First (a) (1976); H.R. Rep. No. 1944, 73d Cong., 2d Sess. 3 (1934), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor & Public Welfare, 93d Cong., 2d Sess., Legislative History of the Railway Labor Act, As Amended 918 (Comm. Print 1974).

82. 45 U.S.C. § 153 First (g) (1976); *see* Glover v. St. Louis-San Francisco Ry., 393 U.S. 324, 327 (1969); H.R. Rep. No. 1944, 73d Cong., 2d Sess. 3 (1934), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor & Public Welfare, 93d Cong., 2d Sess., Legislative History of the Railway Labor Act, As Amended, 918 (Comm. Print 1974); Administration of the RLA, *supra* note 9, at 82.

83. *See* 112 Cong. Rec. H2749 (daily ed. Feb. 9, 1966) (statement of Rep. Younger), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor & Public Welfare, 93d Cong., 2d Sess., Legislative History of the Railway Labor Act, As Amended 1355 (Comm. Print 1974); Northrup & Kahn, *Railroad Grievance Machinery: A Critical Analysis*, 5 Indus. & Lab. Rel. Rev. 365, 368 (1952); Risher *supra* note 9, at 76; *supra* notes 14-15 and accompanying text.

84. H.R. Rep. No. 1944, 73d Cong. 2d Sess. 1 (1926), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor & Public Welfare, 93d Cong., 2d Sess., Legislative History of the Railway Labor Act, As Amended 918 (Comm. Print 1974). Commentators have uniformly recognized the partisanship of the Board, and the rarity of cases that are decided without a referee. Risher, *supra* note 9, at 76 ("overwhelming majority of cases are deadlocked by the parties and require the use of a neutral referee"); Seidenberg, *supra* note 13, at 218, 219 ("carrier members . . . insisted on deadlocking virtually every claim, regardless of its merits, and demand[ed] that the services of a referee be invoked before any claim could be finally deposed"); *Preemption Doctrine*, *supra* note 73, at 200 n.12 ("during the period 1965-1969, only 0.6% of the claims filed with the Third Division of the NRAB were decided without the intervention of a referee to break the deadlock between the labor and carrier members"). Several courts, however, have refused to acknowledge the denial of a fair hearing at the NRAB due to the Board's makeup. These courts maintain that Board members are judges, not advocates, and that they are therefore impartial. Skidmore v. Consolidated Rail Corp., 619 F.2d 157, 159 (2d Cir. 1979), *cert. denied*, 449 U.S. 854 (1980); Ferro v. Railway Express Agency, 296 F.2d 847, 852 (2d Cir. 1961); Sensabaugh v. Railway Express Agency Inc., 348 F. Supp. 1398, 1402 (W.D. Va. 1972); System Fed'n, No. 30 v. Braidwood, 284 F. Supp. 607, 610-11 (N.D. Ill. 1968).

a strict standard of judicial review that has been termed "among the narrowest known to the law."[85] A Board decision is therefore unlikely to be reviewed and subsequently overturned.[86] Consequently, any time an employee has claims against both his employer and union, his chances for obtaining a fair hearing are, at best, minimal.[87]

## CONCLUSION

Because the individual is not as well-equipped as is the union to bring a case before the NRAB, few cases are brought by an employee representing himself. Even more infrequent is the instance when an employee has a complaint joining his employer and union together in a case that stems from the same facts. In view of the importance of an impartial forum as balanced against the small number of claims that would actually be involved, a proper interpretation of *Glover's* futility exception would dictate that courts accept jurisdiction over all disputes that involve both union and employer and stem from the same set of facts. Such a result would protect the interests of the employee and only minimally interfere with the jurisdiction of the NRAB.

*Sandra Katz*

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85. Diamond v. Terminal Ry. Ala. State Docks, 421 F.2d 228, 233 (5th Cir. 1970); *accord* Union Pac. R.R. v. Sheehan, 439 U.S. 89, 91 (1978) (per curiam); Del Casal v. Eastern Airlines, Inc., 634 F.2d 295, 298 (5th Cir.), *cert. denied*, 50 U.S.L.W. 3278 (U.S. Oct. 13, 1981).

86. *See* D'Elia v. New York, N.H. & H.R.R., 338 F.2d 701, 702 (2d Cir. 1964) (per curiam), *cert. denied*, 380 U.S. 978 (1965); McDonald v. Penn Cent. Transp. Co., 337 F. Supp. 803, 806-07 (D. Mass. 1972).

87. In Slocum v. Delaware, Lackawanna & W.R.R., 339 U.S. 239 (1950), Justice Reed discussed the lack of due process inherent in Board hearings. He stated that "Congress surely would not have granted this exclusive primary power to adjudicate contracts to a body like the Board. It consists of people chosen and paid, not by the Government, but by groups of carriers and the large national unions. Congress has furnished few procedural safeguards. . . . Most important, the statute provides no relief for a petitioning party—be he union, individual or carrier—against an erroneous order of the Board. This Court may be hard put to protect the rights of minorities under these circumstances." *Id.* at 251-52 n.8 (Reed, J., dissenting) (footnotes omitted). In Thompson v. New York Cent. R.R., 361 F.2d 137 (2d Cir. 1966), Chief Justice Lumbard asserted that the NRAB could not adequately represent an employee in a hostile discrimination suit because "the structure and membership of the NRAB make it an inherently undesirable forum [for this type of suit] . . . . When the basis of dispute arises out of alleged mistreatment of employees by a union, the union cannot be expected to press the employees' claim vigorously and the Board is not likely to be a sympathetic forum for relief, even when . . . the actual members of the . . . Board are not employed by either [railroad] or the unions involved in the instant dispute." *Id.* at 149 (Lumbard, C.J., concurring in part and dissenting in part).